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IN THE

Supreme Court of the United States

OCTOBER TERM 1949

No. 229

CAPITAL AIRLINES, INC., *Petitioner,*

against

RICHARD I. EDWARDS and
JAMES A. YOUNG, *Respondents*

PETITION OF CAPITAL AIRLINES, INC. FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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PETITION OF CAPITAL AIRLINES, INC. FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The Petitioner, **Capital Airlines, Inc.**, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on May 10, 1949, which judgment denied Capital Airlines' petition for rehearing and reaffirmed a judgment entered March 14, 1949.

Statement of the Matter Involved.

Petitioner Capital Airlines is an interstate air carrier.

Respondent Edwards was first employed by Capital as a probationary co-pilot on December 31, 1940. Subsequently, on November 1, 1941, the active employment of Edwards was discontinued by Capital under circumstances which later gave rise to a controversy as to whether Edwards had been "permanently severed" (and thus lost seniority rights) or had merely been "released due to reduction in force" (and thereby retained certain seniority rights).

Similarly, respondent Young was first employed by Capital as a probationary co-pilot on February 18, 1941. Later, on May 31, 1942, the active employment of Young was discontinued by Capital under circumstances which gave rise to a controversy as to whether he too had been "permanently severed" or had merely been "released due to reduction in force".

After such discontinuance of employment by Capital, both Edwards and Young entered upon active duty with the armed services of the United States. Upon their discharge, they applied to Capital for reemployment as pilots, and Capital gave them such employment, reinstating each upon the pilots' seniority list *with accrued seniority dating back to the date of original employment.* Edwards was thus reemployed beginning November 15, 1945, and Young was reemployed as of October 16, 1945.

Thereupon, eight other pilots whose seniority was affected by the reinstatement of Edwards and Young filed grievances with the Company, contending that both Edwards and Young had been permanently severed from the employment of Capital Airlines prior to the date of their entry into the armed services, and should therefore be treated as new employees with respect to seniority.

The protesting pilots were members of the Air Line Pilots Association, which is the authorized collective bargaining representative for the pilots employed by Capital Airlines. Edwards and Young were not members of the

Association, although they had applied for membership. Since the reinstatement of Edwards and Young affected the seniority of a great many pilots who were members, the Association filed with the Company a "group grievance". This matter was heard by Company officials, and the accrued seniority of Edwards and Young was upheld.

Thereafter, the Association presented the matter to Capital's System Board of Adjustment. This Board had been established as required by the federal Railway Labor Act, and under that Act, the Board had jurisdiction for "adjusting and *deciding*" disputes as to seniority (45 U. S. C. 1946 ed. c. 8, secs. 184 and 153 Second; 49 Stat. 1189 and 48 Stat. 1189). This jurisdiction of the Board was implemented by an agreement between Capital and the Association (as bargaining representative for Capital's pilots), and the agreement provides that *the awards of the Board as to seniority shall be "final and binding"* (R. 27).[1] The System Board consisted of two nominees of the Company and two nominees of the Association.

Both Edwards and Young were given full notice of the hearings and issues before the Board. Both were present personally and by counsel, and both had full and fair opportunity to present to the Board any evidence which they might deem proper. Both had full and fair opportunity to cross-examine and to controvert evidence which proved damaging to their causes. (R. 77, 78, 88, 98-102). The System Board of Adjustment received a very substantial amount of evidence with respect to the two cases, five volumes of transcript and 28 exhibits.

Upon the basis of all this evidence the System Board of Adjustment carefully prepared a written decision (R. 145-146; 148-149). *It held unanimously that Edwards and*

[1] Throughout this brief such references in parentheses refer to the pages of the printed record filed in this Court. On May 4, 1948 the name of Petitioner was legally changed from Pennsylvania-Central Airlines Corporation (as set forth in some parts of the record) to Capital Airlines, Inc.

Young had been "let go permanently" at the termination of the original periods of employment. Accordingly, the Board ordered Capital to conform to the collective bargaining agreement by affording Edwards and Young seniority only from the dates of their reemployment after the war (R. 149, 146).

Dissatisfied with the award of the System Board, Edwards and Young then filed complaints in the District Court for the District of Columbia. They alleged that they had been treated unfairly, and they sought an injunction to prevent Capital from abiding by the award of the System Board (R. 1-30; R. 45-51).

The two cases were consolidated and were fully tried in the District Court. *After trial the District Judge found in each case as follows:*

> "I find that plaintiff has exhausted any rights he conceivably had under the GI Bill of Rights.
>
> "*There is no evidence to indicate that the hearing before the System Adjustment Board was otherwise than fair. It was in no way prejudicial to plaintiff's rights. The decision of the Board is final, and binds this plaintiff.* Counsel for defendants will present for settlement Findings of Fact and Conclusions of Law consistent with this announcement, and a judgment form dismissing the complaint and dissolving the temporary restraining order and the preliminary injunction." (R. 40-41, 56)

Thus the District Court found, *as a fact,* that Edwards and Young had been fairly treated, and ruled that under such circumstances the award of the System Board is "final and binding".

On appeal to the United States Court of Appeals for the District of Columbia Circuit, the judgment of the trial court was reversed and the cause remanded with instructions (R. 192-200). In its opinion the Court of Appeals held:

1. Edwards and Young did not leave their employment with Capital "in order to perform such training and service" with the armed forces, and therefore they have no rights under the federal statutes relating to the reemployment of veterans (R. 193-194).

2. *The award of the System Board of Adjustment is subject to review de novo in the federal courts* because two members of the Board were nominees of the Pilots Association whereas Edwards and Young were not members of that Association (R. 196-199).

3. The Court of Appeals then made its own findings of fact on the merits of the controversy, finding that the two pilots had not been "permanently severed" from the employment of Capital but had merely been "released due to reduction in force" (R. 199-200).

Since the Court of Appeals was "not quite sure" of the exact meaning of the order of the System Board of Adjustment, it remanded the case for the ascertainment of the meaning of the award. The Court of Appeals ruled that the award of the Board must be held invalid unless it recognizes the seniority of Edwards and Young as found and decided by the Court of Appeals (R. 200).

Actually, the award of the System Board is clear, and the Court of Appeals has substituted its own findings of fact for the clear findings of the Board. The Board found that Edwards and Young had been "let go permanently" and therefore were entitled to seniority *only from the dates of their reemployment by Capital Airlines.* Thus the System Board applied section 23 of the collective bargaining agreement, which section provides for the forfeiture of seniority rights when pilots are permanently severed (R. 17). The Court of Appeals substituted its own findings of fact (that the two pilots had been released due to reduction in force), and ruled that Capital must afford Edwards and Young *additional seniority for the first periods of employment.*

Following the issuance of the original opinion of the Court of Appeals, Capital Airlines filed with that court a timely petition for rehearing and for modification of the decree. On May 10, 1949, the Court of Appeals issued a memorandum opinion denying the petition for rehearing, and entered its final judgment in the case. (R. 201 et seq.)

Jurisdictional Statement.

The jurisdiction of this Court is invoked under Title 28, United States Code 1948 ed., secs. 1254(1) and 2101(c).

Questions Presented.

1. When the Railway Labor Act has vested in the System Board of Adjustment full jurisdiction for "deciding" seniority disputes and for making "final and binding" awards in such disputes, and when the System Board has fairly decided such a dispute and has made its award, as in this case, do the federal courts nevertheless have jurisdiction to hear the dispute de novo and to substitute their findings of fact for those of the Board?

2. Even if it is decided that the federal courts do have jurisdiction to hear and decide such a case de novo, was the Court of Appeals for the District of Columbia Circuit correct in its application of the collective bargaining agreement?

Reasons for Allowance of the Writ.

1. The United States Court of Appeals for the District of Columbia Circuit has decided a question of substance relating to the construction of a statute of the United States (the Railway Labor Act), which question has not been, but should be, settled by this Court.

2. The United States Court of Appeals for the District of Columbia Circuit has not given proper effect to the applicable decisions of this Court.

3. The United States Court of Appeals for the District of Columbia Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

WHEREFORE, your Petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the District of Columbia Circuit with respect to the case entitled in its Docket Nos. 9989 and 9990 (Richard I. Edwards, Appellant v. Capital Airlines, Inc. and Air Line Pilots Association, Appellees; and James A. Young, Appellant v. Capital Airlines, Inc. and Air Line Pilots Association, Appellees) to the end that this cause may be reviewed and determined by this Court; and that the order of said Court of Appeals be reversed by this Court.

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No.

CAPITAL AIRLINES, INC., *Petitioner,*

against

RICHARD I. EDWARDS and
JAMES A. YOUNG, *Respondents.*

BRIEF OF CAPITAL AIRLINES, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinions of the Court of Appeals below are not yet reported but appear in the Record before this Court (R. 192 et seq.). The opinion of the District Court below also appears in the Record (R. 40, 56).

The statement of this Court's jurisdiction, and the statement of the case, have previously been set forth in the attached petition for writ of certiorari.

Specification of Errors.

I.

The Court of Appeals erred in reviewing a controversy which is not justiciable, and in substituting its own findings of fact for those of the System Board of Adjustment. The

Railway Labor Act conferred "final and binding" jurisdiction of seniority disputes upon the System Board. Congress did not intend that the federal courts should have power to review orders of the System Board in cases such as this one.

II.

Even if the Court of Appeals had power to decide the case of its merits, the Court erred in its ruling that the rights of Edwards and Young are governed by Section 27 (a) of the collective bargaining agreement, rather than by Section 23 as the System Board had determined.

Summary of Argument.

The Court of Appeals here made its own findings of fact, and a decision on the merits, in a case as to which it had no power whatsoever to take judicial cognizance. Section 1337 of the Judicial Code (28 U. S. C. 1948 ed., sec. 1337) gives the federal district courts "original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce". However, it was held in *Switchmen's Union of North America* v. *National Mediation Board,* 320 U. S. 297, that this statute which governs the general jurisdiction of the federal courts does not apply to controversies arising under the Railway Labor Act. Consequently, jurisdiction of the federal courts, if it exists at all, must stem from the Railway Labor Act itself.

Essentially, the question in issue here involves interpretation of the Railway Labor Act to determine whether it empowers the federal courts to review orders of the System Board of Adjustment. This System Board was established as required by Congress for the purpose of "adjusting and *deciding*" disputes involving seniority, and for making "final and binding" awards in such disputes. Careful examination of the Railway Labor Act, which the Court of Appeals below evidently neglected to make, shows the intent of Congress to keep judicial review

of the orders of the various settlement boards at a minimum. Instances wherein judicial review is allowed are clearly expressed. The instant case is not one of them.

Argument.

Jurisdiction of the federal courts over the controversy in issue is completely lacking since Congress vested complete and final authority to settle such controversies in the System Board of Adjustment.

The question of the justiciability of disputes involving the seniority of railroad and airline employees, which is the main issue here, has never been before this Court for decision. However, the justiciability of several other types of labor disputes arising under the Railway Labor Act has been denied by this Court for the very evident reason that the Act vested "final and binding" jurisdiction of such disputes in the various Boards created therein. Only in a few exceptional cases, which will be discussed in this brief, has this Court recognized the power of the federal courts to review orders of the various settlement Boards established by the Railway Labor Act.

True, Edwards and Young are non-members of the union which presented the grievance against their accrued seniority, but no trace of discrimination against them existed in any of the preliminary grievance hearings before Company officials, or subsequently at the hearing before the System Board of Adjustment. Actually, these hearings involved the rights of Edwards and Young only incidentally. The real controversy was between the Company and the Association. The Company vigorously upheld the accrued seniority of Edwards and Young while the Association contested this position. This the Association was entitled to do since the action of the Company in re-employing Edwards and Young with accrued seniority adversely affected the seniority of a great many other pilots.

Clearly, the Association had every right to protest an action on the part of the Company which the Association honestly deemed a violation of the labor agreement. It is the duty of the Association to protest and oppose all actions on the Company's part which appear to be a breach of the collective bargaining agreement. Whether Edwards or Young were members or non-members of the Association would make no practical difference in such a case. Neither Edwards nor Young had occasion to file grievances at any stage of the proceedings since neither one was aggrieved except by the final order of the System Board of Adjustment. Until that moment the Company's position was that of a powerful champion of Edwards and Young. Indeed, if the System Board had decided the case in favor of Edwards and Young, the other pilots might well have challenged the decision on the ground that the Company favored the two minority pilots. The reasoning of the court below would seem to require such an incongruous result.

In ruling that Edwards and Young were entitled to judicial review, the Court of Appeals cited the *Steele, Tunstall* and *Elgin* cases in support of its reasoning. *Steele* v. *Louisville & N. R. R.*, 323 U. S. 192, is in reality a boomerang since there this Court asserted the "final and binding" nature of the Adjustment Board's authority in matters involving interpretation of a labor agreement, which is exactly what Capital is contending in this proceeding.

The chief question in the *Steele case* was whether the Railway Labor Act imposes upon the exclusive bargaining representative the duty to represent all of the employees in the craft without discrimination because of their race, and if so, do the courts have authority to protect the minority of the craft or class from the violation of such obligation? In the *Steele case* the non-member minority was a group of negro firemen who were abused and demoted by the Company without even a pretense of notice

or a hearing. The rights protected by judicial review in that case were constitutional as well as statutory. Accordingly, in the *Steele case* it was held that the negro minority had "rights" which were enforcible by the federal courts. This Court stated:

> "In the absence of any available administrative remedy, the right here asserted, to a remedy for the breach of the statutory duty of the bargaining representative to represent and act for the members of a craft, is of judicial cognizance. That right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty. . . . *The statutory provisions which are in issue are in the form of commands.* For the present command there is no mode of enforcement other than resort to the courts, whose jurisdiction and duty to afford a remedy for a breach of statutory duty are left unaffected" 323 U. S. at 207).

By contrast, all of the rights of Edwards and Young in the proceeding before the System Board of Adjustment were fully and fairly protected. No statutory "commands" were involved.

The Court of Appeals below concluded that "because the making of the award was in the hands of their active adversaries", Edwards and Young had the right to judicial review. There is no authority for such a principle of law in the *Steele case* or any other case. Furthermore, the Court below committed a factual error in concluding that the award was in the hands of the "active adversaries" of Edwards and Young. The record shows that the membership of the System Board of Adjustment consisted of two Company employees and two Union members. Since the Company had ruled in the preliminary proceedings that Edwards and Young were entitled to accrued seniority, and continued to take that position until overruled by the order of the System Board, it cannot fairly be said that the award of the System Board was in the hands of the "active adversaries" of Edwards and Young. The two

Company members cannot be presumed to have favored the Association's position in the matter. A contrary presumption would be more apt.

In the very question now before the Court, the *Steele* decision is contrary to the decision of the Court below. In the instant case the Court of Appeals' reversal was based upon what was asserted to be an error on the part of the System Board in construing certain sections of the collective bargaining agreement. The Court ruled that Section 27(a), rather than Section 23, of the collective bargaining agreement governed the rights of Edwards and Young. These sections provide as follows:

> "Sec. 23. Any pilot whose services with the Company are permanently severed shall forfeit his seniority right". (R. 17)
>
> "Sec. 27(a). A pilot who is released from the service of the Company due to reduction in force and is subsequently rehired shall retain his seniority to the time of release but shall not continue to accrue seniority after release unless and until he is reemployed. Such pilot, if he keeps the Company advised of his address, will be reemployed in the order of his seniority, provided the Company finds his flying ability and physical condition still meet the required standards. The right of preference in employment shall expire at the end of one year from the date of release". (R. 19)

It is evident, therefore, that the controversy over which the court below has asserted jurisdiction, is a controversy involving the interpretation of the collective bargaining agreement. In the *Steele case* all questions involving *interpretation of the collective bargaining agreement* were left to the expert judgment of the Adjustment Board. Federal jurisdiction over such matters was ruled out. This Court, summarizing various types of labor disputes which are non-justiciable, stated:

> "The question here presented is not one of a jurisdictional dispute, determinable under the administrative

scheme set up by the Act. . . . or restricted by the Act to voluntary settlement by recourse to the traditional implements of mediation, conciliation and arbitration. There is no question here of who is entitled to represent the craft, or who are members of it, issues which have been relegated for settlement to the mediation Board. . . . *Nor are there differences as to the interpretation of the contract which by the Act are committed to the jurisdiction of the Railroad Adjustment Board.*" (323 U. S. at 205)

The Act itself is explicit enough on this point. Section 153, First, (i) and (m), of the Railway Labor Act, confers upon the Adjustment Board final and binding jurisdiction over disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions". The dispute in the instant case, being a controversy between a group of employees and a carrier growing out of an interpretation of the collective bargaining agreement, clearly falls within the import of this Section.

This Court went very thoroughly into the question of justiciability of railroad labor disputes in *General Committee, B. L. E.* v. *Missouri-K. T. R. Co.*, 320 U. S. 323. That case, unlike the instant case, involved a jurisdictional dispute, but the reasoning of the Court is very illuminating. The District Court had decided the case on the merits, but this Court ruled that the Federal courts had no power under the Railway Labor Act to resolve the controversy. In tracing the history of the Act, this Court stated:

"In short, Congress by this legislation has freely employed the traditional instruments of mediation, conciliation and arbitration. Those instruments, in addition to the available economic weapons, remain unchanged in large areas of this railway labor field. *On only certain phases of this controversial subject has Congress utilized administrative or judicial machinery and invoked the compulsions of law.* Congress was dealing with a subject highly charged with emotion. Its approach has not only been slow; it has been

> piecemeal. Congress has been highly selective in its use of legal machinery. The delicacy of these problems has made it hesitant to go too fast or too far. The *inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate.* (320 U. S. at 332-3).

If Congress did not select the courts to resolve jurisdictional disputes, neither did it select the courts to settle seniority disputes involving technical interpretation of a collective bargaining agreement. *To the contrary, it fashioned an administrative remedy, and vested final and binding jurisdiction over seniority disputes in the System Board of Adjustment.* The Railway Labor Act does not contain the slightest suggestion that disputes involving seniority may be reviewed by the federal courts. As this Court further stated in the *General Committee*, supra:

> *"In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforcible in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals. . . . Courts should not rush in where Congress has not chosen to tread"* (320 U. S. at 337)

In *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, this Court also held that, lacking any specific provision for judicial review in the Act, labor disputes entrusted to settlement boards are non-justiciable. That case, like the *General Committee* case, involved a jurisdictional dispute. This Court ruled that the "right" of the majority of any craft to determine who shall be the representative of the craft is protected by Section 2, Ninth, of the Railway Labor Act, which Section gives the Mediation Board power to determine the issue. Since a proper administrative method has been determined by Congress to settle such questions, this Court ruled:

"review by the federal district courts of the Board's determination is not necessary to preserve or protect that 'right'. *Congress for reasons of its own decided upon the method for the protection of the 'right' which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end.* Whether the imposition of judicial review on top of the Mediation Board's administrative determination would strengthen that protection is a considerable question. *All constitutional questions aside, it is for Congress to decide how the rights which it creates shall be enforced. . . . In such a case the specification of one remedy normally excludes another*" (320 U. S. at 301)

By the same reasoning, in the instant case, the judicial review imposed by the Court of Appeals on top of the determination of the System Board of Adjustment was superfluous and unauthorized by law. All constitutional and statutory rights of Edwards and Young were fully protected by both parties to the dispute, and the hearing before the System Board was a model of fairness and thoroughness.

The two remaining United States Supreme Court cases cited by the court below lend no weight to the court's conclusion that the seniority dispute in the instant case could be judicially reviewed. The *Tunstall case* involved racial discrimination and the result was the same as in the *Steele case,* discussed supra. *Elgin, J. & E.* v. *Burley,* 325 U. S. 711, was so dissimilar to the instant case in the question involved that it is entitled to no consideration whatsoever. Careful study of all Supreme Court decisions on the point shows that the cases cited by the court below in support of its decision allowing judicial review state only the narrow exceptions to the general rule.

This question was carefully examined by the United States Circuit Court of Appeals, Fifth Circuit, in *Brotherhood of Railroad Trainmen* v. *Texas & P. Ry. Co.,* 159 F. (2d) 822, where the Court stated:

"In the Steele and Tunstall cases, the court fully recognized the broad scope and binding force of the *general rule as declared in the Switchmen's Union and the General Committee cases.* In sustaining the right of Steele and Tunstall to judicial relief, it took the greatest pains to point out that it sustained that right because, with the Union acting adversely on racial grounds to the very persons they were supposed to represent, the constitutional right of the plaintiffs not to be discriminated against would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such an obligation." (159 F. (2d) at 826)

Since the ruling of the court below is in conflict with the general rule adopted by this Court in the *Switchmen's* and *General Committee* cases, a writ of certiorari should be granted.

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RICHARD I. EDWARDS and JAMES A. YOUNG, *Respondents*

Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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THE PARTIES

A cross petition for certiorari is filed simultaneously herewith. In order to avoid confusion, petitioner, Capital Air Lines, Inc.,[1] will be referred to as "Capital" and the cross petitioners-respondents as the "plaintiffs".

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[1] Formerly Pennsylvania Central Airlines, Inc. In the record Capital is sometimes referred to as Pennsylvania Central Airlines and sometimes as PCA.

OPINIONS BELOW

The opinions below have not been reported. The District Court wrote an "informal memorandum opinion" (R. 40-41). The Court of Appeals handed down an opinion reversing the decision of the District Court (R. 192-200) and an opinion denying rehearing (R. 208-209).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). The order denying rehearing was entered on May 10, 1949 (R. 210). The petition for certiorari was filed on August 8, 1949. Earlier, on July 18, 1949, the Chief Justice had extended the time to file a cross petition for certiorari until September 7, 1949 (R. 213). Thereafter, on August 15, 1949, the Chief Justice extended the time to file both a cross petition and a brief in opposition to the petition until October 7, 1949 (R. 213).

STATUTES INVOLVED

The petition involves Title II of the Railway Labor Act (45 U. S. C. §§ 181-188), Capital being an interstate air carrier. The cross petition involves the Selective Training and Service Act of 1940, Section 8 of which is set out in the Appendix thereto.

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly ruled (R. 199) that "under the combination of circumstances here present, these appellants [plaintiffs] have a right to have a court examine" the award of a System Board of Adjustment purporting to reduce their seniority.

2. Whether the Court of Appeals properly construed a certain collectively bargained employment contract

between Capital and the Air Line Pilots Association, and whether it properly determined plaintiffs' seniority under that contract.

3. Whether the Court of Appeals properly refused to find that plaintiffs had been discharged just before they entered military service, and whether it was correct in finding instead that they had been laid off in a reduction in force.

STATEMENT

The plaintiffs are pilots in the employ of Capital. They had been employed as pilots before the war. In 1941 and 1942, respectively, they left Capital and entered military service. In 1945, both returned and sought reemployment. Capital then made a thorough investigation of their cases and decided that both had been laid off in reductions in force prior to entry into military service. Capital therefore concluded, in accordance with the later decision of this Court in *Fishgold* v. *Sullivan Corporation*, 328 U. S. 275, that despite the layoffs, plaintiffs were in its "employ" when they entered military service, and that they accordingly were entitled to the rights of returning veterans.[2] Plaintiffs were then reemployed with full seniority accrued from the date of their original employment to the date of their reemployment including credit for time spent in military service (R. 123-124, 129).

Soon after such reemployment, plaintiffs' seniority was challenged by the Air Line Pilots Association, a union representing *all* Capital pilots as collective bar-

[2] Capital recognized plaintiffs' rights both under the Selective Training and Service Act and under a collectively bargained employment contract then in force between Capital and its pilots. (R. 12-29, 123-124, 129).

gaining agent under Title II of the Railway Labor Act. Plaintiffs are *not* members of the Association. They have applied for membership and have been turned down (R. 86, 96, 109).

The Association began grievance proceedings under the collectively bargained employment contract then in force between it and Capital (R. 12-29). It took the position that plaintiffs had not in fact been laid off before entering military service. It maintained instead that they had been discharged. In Young's case, the reason for the discharge was said to be incompetence (R. 158). In the case of Edwards, no motive or reason was given, and the only suggestion of a reason which anyone has made is that he is a Jew.[3] The grievance came on for hearing before a company official in accordance with the contract, and the decision was against the Association (R. 135-141). On two intra-company appeals, the decision was upheld (R. 141-145). The Association then took a third appeal to Capital's System Board of Adjustment, a body established by contract between Capital and the Association consisting of two representatives of the Association and two of Capital (R. 23-29). The Board for the first time sustained the Association's contentions (R. 145-149).

Capital then threatened to reduce plaintiffs' seniority because of the Board's decision, and plaintiffs immedi-

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[3] At the pretrial conference in this case, counsel for the Association stated that Edwards was discharged because he was Jewish (R. 59). Capital has vigorously denied that its employment practices are in any way tinged with anti-Semitism (R. 108). And the only other reference in the record to anti-Semitism relates to a warning given Edwards when he returned from the Navy that he might expect some pilots to be hostile (R. 84-86, 121-122). No one has suggested that Edwards was not an excellent pilot and had not given excellent service prior to his layoff (R. 59).

ately instituted this suit seeking: (1) an injunction against such impairment of their seniority; and (2) a declaration of their rights. After trial on the merits, the District Court dismissed their complaints, but the Court of Appeals reversed (R. 40-41, 192-200, 208-209). It held that the Board's award was not conclusive on the plaintiffs under all the circumstances divulged by the record. It then went on to hold that plaintiffs had been laid off and that under the employment contract, they were entitled to seniority accrued from the date of original employment to the date of the layoffs. It also held that plaintiffs were not entitled to seniority accrued while in military service either under the contract or under the Selective Training and Service Act.

REASONS FOR THE DENIAL OF CAPITAL'S PETITION FOR CERTIORARI

Capital has petitioned for certiorari on the sole ground that the Court below erroneously failed to treat the award of the System Board as "final and binding" on the plaintiffs. This, it is said, presents a question of law so important as to merit review in this Court. The decision below, however, does not present any question of broad significance and is narrowly confined to special and peculiar facts. No conflict of decisions between Circuit Courts of Appeals is claimed by Capital or in any way involved. Capital admits that the decision is not in conflict with any decision of this Court (Petition, p. 11).

The special facts of this case are as follows: Under the Railway Labor Act, the Association represents all Capital pilots, both members and non-members. The plaintiffs, who have been denied membership, are nonetheless forced to accept the Association. The Association occupies a trust relationship with all whom it rep-

resents. *Steele* v. *Louisville & Nashville Railroad*, 323 U. S. 196, 202-207. Yet it took sides in favor of some of its cestuis against other cestuis, the plaintiffs. It vigorously prosecuted the seniority grievance against plaintiffs (R. 133-190). In fact as well as form it carried the laboring oar. Having lost three times in the intra-company stages of the grievance proceeding, the Association took the case to a Board composed of four Association members (two of whom—the company representatives on the Board—were "inactive" because they were supervisory employees of Capital (R. 103). One of these "inactive" Association members on the Board, Captain Reid, had testified against one of the plaintiffs at the first hearing on the grievance (R. 158). The two active Association members, Captains Garlow and Bernier, had represented the Association at all previous stages of the grievance proceeding, and *thus presented the spectacle of unsuccessful prosecutors trying to win their case by climbing on the bench of the Appellate Court.* (R. 86, 87, 142, 144, 150, 151, 162, 167). Captain Bernier even went outside the Board room, procured hearsay evidence against one of the plaintiffs, and testified to it *from the bench* (R. 190). Plaintiffs, it is true, were present at the extraordinary proceedings before these prosecutor-witness-judges, but they were not recognized as parties (R. 179-180), and they objected to the propriety of the grievance proceeding and to jurisdiction of the Board at every step. (R. 153-155, 160-161, 163-165, 170-173, 176-178, 180-190).

These special circumstances bring the case within the *Steele* case (*supra*). They show that the plaintiffs have been the victims of a Board made up of their active adversaries, in the deliberations of which they had no voice, and which was not only inherently prejudiced

as a matter of law (*Steele* case, 323 U. S. at pp. 205-207) but prejudiced in fact as well. Accordingly, the plaintiffs maintained that despite the wide jurisdiction of System Boards over ordinary grievances, this *particular* Board had no jurisdiction over this *particular* dispute.

The Court below did not accept plaintiffs' argument completely, but it held that under all the circumstances, the Board's award was not conclusive. And the Court was very careful to limit its decision to the precise facts. A narrower decision can scarcely be imagined. It expressly negated any decision of broad principle. It said:

> "We make this decision no broader than the case. We are fully conscious that implications of more general doctrine seem to appear. But other holdings can await other cases." (R. 199).

Such a narrow holding does not merit review in this Court. In *Nord* v. *Griffin,* 86 F. 2d 481 (C. C. A. 7th, 1936), *cert. denied,* 300 U. S. 673, this Court has already refused to review a decision of a Circuit Court of Appeals that an award of the National Railroad Adjustment Board did not bind an employee who, because of peculiar circumstances, was not adequately represented. And Capital does not contend here that the System Board's award would be conclusive if, for instance, it appeared that the plaintiffs had no notice of the proceeding. Capital's point really is that the plaintiffs were *sufficiently* represented before and on the Board and that *under all the circumstances* they were treated fairly. Thus the issue before the Court below was whether, under all the circumstances, the plaintiffs *were* treated fairly. The lower Court's care-

ful consideration of the facts and its disagreement with Capital plainly raise no questions for this Court.

Respectfully submitted,

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October 6, 1949

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IN THE

Supreme Court of the United States

October Term 1949

RICHARD I. EDWARDS and JAMES A. YOUNG, *Petitioners*

v.

CAPITAL AIRLINES, INC., *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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THE PARTIES

This is a cross petition for certiorari filed defensively in connection with the petition of Capital Airlines, Inc.,[1] in *Capital Airlines, Inc.*, v. *Edwards, et al.*, No. 229, this Term. To avoid confusion, cross petitioners will be referred to as the "plaintiffs" and the petitioner-respondent as "Capital".

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[1] Formerly Pennsylvania Central Airlines, Inc. In the record Capital is sometimes referred to as Pennsylvania Central Airlines and sometimes as PCA.

OPINIONS BELOW

The opinions below have not been reported. The District Court wrote an "informal memorandum" opinion (R. 40-41). The Court of Appeals handed down an opinion reversing the decision of the District Court (R. 192-200), and an opinion denying rehearing (R. 208-209).

JURISDICTION

The order denying rehearing was entered on May 10, 1949 (R. 210). On July 18, 1949, the Chief Justice extended the time to file a petition for certiorari until September 7, 1949. On August 15, 1949, he again extended it until October 7, 1949 (R. 213). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

STATUTES INVOLVED

Plaintiff Edwards, because he held a commission in the Naval Reserve, relies on the Army Reserve and Retired Personnel Law of 1940.[2] Plaintiff Young, because he was a volunteer, relies upon the service Extension Act of 1941,[3] which made applicable to volunteers the Selective Training and Service Act of 1940[4] (designed originally to cover only inductees). The rele-

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[2] Joint Resolution of August 27, 1940, c. 689 (54 Stat. 858-860), as amended by the Act of September 16, 1940, c. 720 (54 Stat. 891), 50 U. S. C. App., § 403. Though Edwards held a Navy commission he relies upon a statute entitled the *Army* Reserve and Retired Personnel Act; that Act specifically covers both the "land and naval" forces.

[3] Joint Resolution of August 18, 1941, c. 362 (55 Stat. 626-628), 50 U. S. C. App., § 357.

[4] Act of September 16, 1940, c. 720 (54 Stat. 885-897) as amended by the Act of December 8, 1944, c. 548 (58 Stat. 798), 50 U. S. C. App., § 308.

vant portions of the Army Reserve and Retired Personnel Law of 1940 are identical with those of the Selective Training and Service Act of 1940, and the only significance of the Service Extension Act of 1941 is to make applicable to a person in Young's position the provisions of the Selective Training and Service Act of 1940. As in the Courts below, we shall therefore refer only to the Selective Training and Service Act, the salient portions of which are set out in the Appendix.

QUESTIONS PRESENTED

1. Whether, contrary to the decision below, this case is controlled by *Fishgold* v. *Sullivan Corporation,* 328 U. S. 275.

2. Whether the plaintiffs, who left for military service immediately after they were laid off in reductions in force, were nevertheless entitled to reemployment without loss of seniority for time spent in military service under either the Selective Training and Service Act of 1940 or under a collectively bargained contract between Capital and the Air Line Pilots Association.

3. Whether plaintiff Young, who volunteered for military service and who thereafter was laid off in a reduction in force, lost all rights under the Selective Training and Service Act of 1940 and under the aforesaid contract as a result of such layoff.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the District of Columbia Circuit erred:

1. In refusing to follow the *Fishgold* case (*supra*).

2. In deciding that plaintiffs are not entitled to unbroken seniority from the date of their original employment under either the Selective Training and Ser-

vice Act or the contract between Capital and the Air Line Pilots Association (R. 29).

3. In holding that plaintiff Young's rights under the Selective Training and Service Act were cut off by a layoff which took place *after* he had made "all arrangements" to enter the Army (R. 92-93).

STATEMENT

Plaintiffs are pilots in the employ of Capital, and this suit involves their seniority as such pilots. Two periods of time are involved: (1) the period of their employment with Capital before the war; and (2) the period of the war when plaintiff Edwards served in the Navy and plaintiff Young with the Army Air Force. Plaintiffs claim seniority accrued during both periods. The Court below found them entitled to seniority accrued during the first period, before the war, and Capital's petition in No. 229 challenges its decision in this regard. The Court also found that plaintiffs were not entitled to accrue seniority while away at war, and the cross petition challenges this aspect of its decision.

Plaintiffs are concerned about their seniority because it determines whether they fly for Capital as captains (first pilots) or as co-pilots. A captain on an airline such as Capital is at the height of his profession, whereas a co-pilot in matters of both pay and prestige is little more than an apprentice (R. 8-9). As a result of the decision below, both plaintiffs have flown as captains since August when the Court of Appeals refused a further stay of its mandate. It is possible, however, that the seniority won below will prove insufficient to prevent their demotion to the rank of co-pilot during the winter months when airline schedules are curtailed. As a practical matter then, a reversal on the cross peti-

tion would make them year round captains; a denial of both petitions would leave them as Spring, Summer and Fall captains; and a reversal on Capital's petition (if not coupled with a reversal on the cross petition) would reduce them to co-pilots.

With the foregoing contingencies before them, plaintiffs decided not to file a petition for certiorari even though the decision below is squarely in conflict with *Fishgold* v. *Sullivan Corporation,* 328 U. S. 275. Their decision was made simply because they have been harassed by this case for three years and could ill afford further litigation. When Capital filed its petition, however, they were forced to file this cross petition in order to assure the Court's power to consider the entire case. *Langnes* v. *Green,* 282 U. S. 531. Under the circumstances, they do not wish a grant of the cross petition unless the petition is granted.

The facts of the case and its procedural course are stated in some detail in the brief in opposition to certiorari in No. 229, and no useful purpose would be served by repetition here.

REASONS FOR THE ISSUANCE OF THE WRIT

I

THE DECISION BELOW IS IN CONFLICT WITH *Fishgold* v. *Sullivan Corporation,* 328 U. S. 275.

The Court below found as a fact that plaintiffs were laid off in reductions in force in 1941 and 1942, respectively (R. 199-200, 209). It is conceded that they immediately entered military service, served honorably throughout the war, and returned to Capital under circumstances which fulfilled all the conditions of the Selective Training and Service Act (R. 85, 87, 93).

The only question is whether the layoffs severed the employer-employee relationship to such an extent that plaintiffs were not in the "employ" of Capital when they entered military service. This question arises out of the language of section 8 of the Act which covers only a:

> "person who, in order to perform such training and service, has left or leaves a position *in the employ* of any employer. . . ." (Italics ours).

Virtually the same question arises under section 21(f) of a collectively bargained contract between Capital and the Air Line Pilots Association which in effect incorporates the Selective Training and Service Act (R. 29).[5]

The Court below held that the layoffs severed the employer-employee relationship and that plaintiffs therefore were not "in the employ" of Capital when they entered military service. This decision is plainly in conflict with the *Fishgold* case unless the Court's distinction of the *Fishgold* case is valid. The Court said that Fishgold's layoff involved a "temporary cessation of work" whereas plaintiffs' layoffs were so "permanent" as to work a complete severance of the employment (R. 193-195).

The distinction is not valid. The plaintiffs' layoffs were "permanent" only because plaintiffs immediately went to war. As soon as they were available, they were

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[5] Section 21 (f) of the contract, as amended, provides that a "pilot" who goes to war shall "continue to accrue seniority" while in military service (R. 29). The question under this section is therefore whether plaintiffs were "pilots" when they entered military service, and this question in turn depends upon whether they were then *in the employ* of Capital.

rehired. Moreover, there is nothing whatever in the language of the Act which so much as suggests the Court's distinction, and as the *Fishgold* case holds (328 U. S. at p. 287) the Act was a carefully drafted piece of legislation which would have expressed such a distinction if one had been intended.[6] Furthermore, the decision below is an extremely narrow one which runs contrary to the admonition of the *Fishgold* case that the Act should be construed liberally in favor of those who went to war.[7]

It follows that the conflict with the *Fishgold* case is a square one.

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[6] The Court said in the *Fishgold* case that "* * * when Congress desired to cover the contingency of a layoff, it used apt words to describe it." 328 U. S. at p. 287. The Act covers any person "who, in order to perform such [military] service leaves a position, other than a temporary position, *in the employ* of any employer * * *." (italics ours) This language actually *does* "cover the contingency of a layoff"; for "in common parlance and industrial parlance" (328 U. S. at p. 286), a laid-off employee remains *in the employ* of his employer. *National Labor Relations Board* v. *Waterman*, 309 U. S. 206; *North Whittier Heights Citrus Association* v. *N. L. R. B.*, 109 F. 2d 76, 82 (C. C. A. 9th, 1940); *Marlin Rockwell Corp.* v. *N. L. R. B.*, 133 F. 2d 258 (C. C. A. 2d, 1943); *Reiber* v. *Rathbone*, 180 Wisc. 287, 193 N. W. 67 (1923); *Neid* v. *Tassie's Bakery*, 219 Minn. 272, 17 N. W. 2d 357 (1945).

[7] For example, the lower Court's construction would exclude from the benefits of the Act all persons inducted into service following common work stoppages caused by the war. Thus an employee inducted the day before such a work stoppage would be entitled to reemployment after the war. An employee inducted the day after, however, would have received a "permanent" or "complete" layoff, and according to the Court below he therefore would not be entitled to reemployment. The first employee having been hit *only* by the draft is covered by the Act but the second having been hit *both* by a war-induced work stoppage *and* by the draft is not. Congress obviously could not have intended any such distinction between the two employees.

II

THE DECISION BELOW AS TO YOUNG IS INCONSISTENT WITH *Rudisill* v. *Chesapeake & Ohio Ry. Co.*, 167 F. 2D 175 (C. C. A. 4TH 1948) AND *McCarthy* v. *M. & M. Transportation Company*, 160 F. 2D 322 (C. C A. 1ST, 1947).

It is undisputed that in the case of plaintiff Young "all arrangements had been made where I [he] could go into the Ferry Command" of the Army Air Force well before he received his notice of layoff (R. 91-93). It is also undisputed that *after* making such arrangements, Young told his immediate superior in Capital of his intention to enter the Army Air Force and requested his release for that purpose (R. 93). In the *Rudisill* case (*supra*), it was held that one who was immune from the draft (like Young, R. 125) and who nevertheless volunteers is entitled to the benefits of the Selective Training and Service Act. In the *McCarthy* case (*supra*) it was said that when a man is on his way into military service, an employer cannot cut off his rights under the Act by a discharge. It follows *a fortiori* from the *Rudisill* and *McCarthy* cases that once Young volunteered, his rights under the statute could not be cut off by a layoff, and the decision below that his rights were so cut off is in conflict with those two decisions.

CONCLUSION

As previously stated, plaintiffs do not wish an independent grant of the cross petition. If, however, the petition in No. 229 were to be granted, the cross petition should likewise be granted. A reversal of the decision below on the authority of the *Fishgold* case would provide a complete answer to all the contentions advanced by Capital in No. 229, and, although there are many

other answers to those contentions, the Court should make certain that it has the power to give that answer. *Langnes* v. *Green,* 282 U. S. 531. Moreover, the veterans' status of the plaintiffs as of the time of their postwar return to Capital has been inextricably involved in this dispute from the outset, and it would be most unjust and distorting to attempt review of this case with that status excluded from consideration.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit be granted, but only if the petition in No. 229 is granted.

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APPENDIX

Selective Training and Service Act of 1940

(Act of September 16, 1940, c. 720 (54 Stat. 885-897), as amended by the Act of December 8, 1944, c. 548 (58 Stat. 798), 50 U. S. C. App., § 308).

Section 8.

(a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. . . .

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for re-employment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

* * * * *

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * *

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been

on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

* * * * *

(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. . . .